Supreme Court, U.S.
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96 387 SEP 5 1996

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In The

Supreme Court of The United States

October Term 1996

JAMES L. DODARO, HOWARD YERUSALIM, FRANK A. URSOMARSO, JAMES F. MALONE, III, JOHN L. SOKOL, JR., S. MICHAEL PALERMO, JOSEPH L. DIRIENZO, SAMUEL S. CARNABUCI, MELVIN M. SHELTON, DEBORAH KOVAL, GEORGE PILECKI AND SEAN PILECKI,

Petitioners

vs.

CHARLES CHRISTY ,

Respondent

On Petition For Writ of Certiorari To The United States Court of Appeals For The Third Circuit

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PETITION FOR WRIT OF CERTIORARI OF PETITIONERS JAMES L. DODARO, HOWARD YERUSALIM, FRANK A. URSOMARSO, JAMES F. MALONE, III, JOHN L. SOKOL, JR., S. MICHAEL PALERMO, JOSEPH L. DIRIENZO, SAMUEL S. CARNABUCI, MELVIN M. SHELTON, DEBORAH KOVAL, GEORGE PILECKI AND SEAN PILECKI

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65 pp

QUESTIONS PRESENTED

1. Whether Petitioners are entitled under *Behrens v. Pelletier*, 116 S. Ct. 839 (1996), and *Johnson v. Jones*, 115 S. Ct. 2151 (1995), to immediate appellate review of the denial of their qualified immunity claims asserting that although the relevant law was clearly established, their actions were objectively reasonable, where the District Court stated that there were issues of fact but did not identify them.

2. Whether, in a qualified immunity appeal, the presense of a factual issue is sufficient to negate the defendents' right to immediate appellate review of their claim that their actions satisfied the second prong of qualified immunity, objective legal reasonableness, contrary to this Court's decision in *Behrens v. Pelletier*, and the decisions of most other circuits.

LIST OF ALL PARTIES

The Petitioners are James L. Dodaro, Howard Yerusalim, Frank A. Ursomarso, James F. Malone, III, John L. Sokol, Jr., S. Michael Palermo, Joseph L. DiRienzo, Samuel S. Carnabuci, Melvin M. Shelton, Deborah Koval, George Pilecki and Sean Pilecki, all defendants below.

Additional defendants who are not participating in this appeal include the Pennsylvania Turnpike Commission, an agency of the Commonwealth of Pennsylvania, Robert Brady, John Boschi, John Stewart, and Vincent Greco.

The respondant is Charles Christy, plaintiff below.

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PETITION FOR WRIT OF CERTIORARI of Petitioners James L. Dodaro, Howard Yerusalim, Frank A. Ursomarso, James F. Malone, III, John L. Sokol, Jr., S. Michael Palermo, Joseph L. DiRienzo, Samuel S. Carnabuci, Melvin M. Shelton, Deborah Koval, George Pilecki and Sean Pilecki

Petitioners respectfully request that a Writ of Certiorari issue to review the judgment entered by the Court of Appeals for the Third Circuit in this case on June 19, 1996.

OPINIONS BELOW

The opinion of the District Court below is reported at *Christy v. Pennsylvania Turnpike Commission*, 904 F. Supp. 427 (E.D.Pa. 1995), and is reproduced *infra* at App. 1a. The Judgment Order (without opinion) of the Third Circuit Court of Appeals is unreported, but is available at 1996 U.S. App. LEXIS 17939 (3d Cir. June 19, 1996) and is reproduced *infra* at App. 1b. The Order denying appellants' Petition for Rehearing dated July 19, 1996 is reproduced infra at App. 1c.

JURISDICTION

The judgment of the Third Circuit Court of Appeals was initially entered on June 19, 1996. The Court of Appeals denied the Petitioners' timely petition for rehearing on July 19, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

STATEMENT OF THE CASE

Factual Background

Plaintiff Charles Christy claims that in 1993 he was denied two promotions at the Pennsylvania Turnpike Commission (the "Commission") because of political discrimination. The positions were: Eastern Region Paint Crew Foreman and Regional Fleet Equipment Manager - East. Petitioners are current or former Commissioners or Commission employees whom Christy alleges were involved in some way

in the promotion process for one or both of the promotion vacancies which Christy challenges.

Petitioners James Dodaro, Howard Yerusalim, Frank Ursomarso, and James Malone were Commissioners at the time of the two promotions. Dodaro and Yerusalim voted to approve the candidates recommended by the Personnel Committee for the two promotions.[1] Ursomarso did not vote because was not present at either of the two meetings at which the votes were taken, and Malone did not vote on the second promotion because he was not present for the vote to approve the second promotion.

Petitioners John Sokol, Michael Palermo, Joseph DiRienzo, Samuel Carnabuci, Deborah Koval (now Everly) and Melvin Shelton were members of the Personnel Committee at the time of the disputed promotions. The Personnel Committee reviewed the interview results for the top three ranked candidates for each of the two promotions, and in each case made a single recommendation to the Commissioners.

Christy also sued Sean Pilecki and George Pilecki, who were not part of the promotion process. Sean Pilecki is a Commission employee who was a member of the Paint Crew, and was the successful candidate for the Paint Crew Foreman position. George Pilecki is Sean Pilecki's father, and a retired Commission employee who worked as a clerk.

Commission Procedures for Promotion - Policy Letter 65

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1 Sean Pilecki, who is a defendant and a petitioner herein, was promoted to Paint Crew Foreman. Commission employee Frank Dunn, who was not sued by Christy, was promoted to the Regional Fleet Equipment Manager position.

The promotions at issue were governed by the Commission's Policy Letter 65, which set forth detailed merit-selection procedures for filling vacancies in supervisory positions, including a three-step merit system to process applications for promotions. Policy Letter 65 was adopted in part to comply with this Court's decision in *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990).

The policy directs that job openings be posted, so that any current employee may apply. Those applications which meet minimum requirements (length of service, education, etc.), are accepted by the Human Resources office, and are sent to the appropriate department head, who appoints a three person "Interview Committee" to interview all applicants who meet the minimum standards. The candidates are rated numerically using the written job criteria and the interview results. The names of the three to six highest scoring candidates are forwarded to the Personnel Committee, together with a written explanation why the particular candidates were recommended.

The Personnel Committee then reviews the Interview Committee's recommendations and chooses one of the top ranking candidates to send to the Commission. The Commissioners have uniformly followed the recommendation of the Personnel Committee; under Policy Letter 65 they may only accept, reject or defer the recommendation; they may not select another candidate. The Commissioners generally vote to approve Personnel Committee recommendations (at least for the lower-level supervisory promotions such are at issue in this case) on a voice vote at formal Commission meetings.

The Promotions at Issue

Plaintiff was one of three individuals recommended by the Interview Committee to the Personnel Committee for the

position of Paint Crew Foreman. While Plaintiff gratuitously identified his political affiliation on his resume, the record of this case contains no facts whatsoever concerning the political affiliation of the successful candidate, Petitioner Sean Pilecki. After reviewing all of the material, the Personnel Committee recommended Petitioner Sean Pilecki to the Commission as the most qualified candidate, and he received the promotion.

Plaintiff then applied for the position of Regional Fleet Equipment Manager - East. However, plaintiff was not among the three individuals recommended by the Interview Committee to the Personnel Committee; therefore, the members of the Personnel Committee as well as the Commissioners, had no knowledge that plaintiff had even applied for this job. Another Commission employee, Frank Dunn, who was recommended to the Personnel Committee, and subsequently the Commissioners, received the promotion.

In support of his allegations of political discrimination, plaintiff Christy relied on two facts. First, he relies on his own version of a conversation which he had with John Boschi (not a petitioner, but a defendant in the District Court), who was in charge of maintenance for the Commission and had been a member of the Interview Committee for the Paint Crew position. Under plaintiff's version of this conversation, Boschi told plaintiff that he did not get the Paint Crew promotion because plaintiff failed to get the support of Commissioner Brady (also a defendant in the District Court, but not a petitioner). Boschi allegedly advised Christy that politics was important in getting promotions on the Turnpike. There is no evidence that any other petitioner had knowledge of the Boschi conversation, or that there is any legal principle under which a petitioner could be bound or was influenced by that conversation.

Secondly, plaintiff presented an affidavit of Louis Sperduti (contradicting Sperduti's own sworn deposition taken at the outset of the case), that Petitioner Sean Pilecki and his father, Petitioner George Pilecki, had admitted that they "were willing to use" unspecified political influence in getting a promotion for Sean Pilecki. Frank Dunn, who received the Regional Fleet Equipment Manager promotion, allegedly made a similar statement to Sperduti.

Summary Judgment Motions

Christy filed suit pursuant to 42 U.S.C. § 1983 alleging that the defendants made adverse employment decisions against him based on his political affiliation, in violation of his First Amendment rights. Jurisdiction before the District Court arose pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1331 (general federal question jurisdiction).

Each petitioner separately filed a summary judgment motion in January 1995, after some discovery had occurred, but well before discovery was complete. Plaintiff did not respond to the motion, but was permitted to complete discovery. Following discovery, summary judgment motions were also filed on the merits of the case as well. Petitioners' qualified immunity claims were based on each defendant showing, based on the uncontradicted facts, that he or she reasonably could have believed his or her conduct was consistent with the clearly established law, *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990).

Under the Qualified Immunity doctrine, there are two separate inquiries. The first is whether the legal principles governing the defendants' actions were clearly established at the time of those actions. If the relevant law was clearly established (as petitioners concede), the second inquiry must be

posed, whether a reasonable official in the circumstances of each defendant would believe that his or her conduct was consistent with the clearly established law. This issue is addressed under a test of "objective reasonableness." *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). Qualified immunity protects an official, even when the relevant law is clearly established, where a reasonable official in the same circumstances could conclude that his actions were consistent with clearly established law.

Petitioners' qualified immunity claims were and are based on the second of the two inquiries -- that reasonable officials under the same circumstances would believe that their actions under Policy Letter 65 were consistent with clearly established law.

The Decisions Below

The District Court denied summary judgment on the merits and on qualified immunity for all the defendants in one opinion, entered November 8, 1995, *Christy v. Pennsylvania Turnpike Commission*, 904 F. Supp. 427 (E.D.Pa. 1995). After correctly citing the legal test for qualified immunity, the District Court denied summary judgment as follows:

> Joint Defendants argue that summary judgment is appropriate because they followed the procedures established in Policy Letter 65. They argue that since they could reasonably have believed that Policy Letter 65's procedures defined the legal way to promote and because they did follow Policy Letter 65's procedure, they could reasonably have believed that they acted lawfully and are entitled to qualified immunity.

> If Christy alleged procedural violations, this argument would succeed. Christy's lawsuit, however, ***alleges*** that although Joint Defendants may have comported with the administrative procedures in that they had the appropriate meetings and took the appropriate votes, in fact, these procedures were a smokescreen for the actual political patronage promotion process. For this reason, Joint Defendants' reliance on process does not answer whether they reasonably believed they acted legally. . . .
>
> * * *
>
> [W]e conclude that summary judgment is . . . inappropriate on the issue of qualified immunity. If Christy's ***allegations*** are true, then Joint Defendants knowingly used the procedures in Policy Letter 65 to effectuate political patronage, which was clearly proscribed at the time. *Rutan*, 497 U.S. 62. No public official could reasonably have believed that such knowing circumvention was legal, and for this reason we deny summary judgment.

904 F. Supp. at 434, App. 15a-16a (emphasis added). The District Court thus relied on *allegations* rather than facts of record to deny qualified immunity.[2] After thus rejecting the qualified immunity claims of twelve defendants, the District

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2 In a subsequent opinion denying interlocutory appeal on the merits, the Court attempted to correct this error by classifying it as a mere misstatement; however, no opinion identifies what evidence supports Christy's allegations.

Court subsequently granted summary judgment for one of the same defendants on reconsideration, not merely on qualified immunity, but on the merits of plaintiff's claim:

> We find that this evidence does not, in fact, indicate that Ursomarso had actual knowledge of political discrimination and that he abstained from voting on personnel matters to allow the discrimination to continue and that this abstention fostered an atmosphere that tolerated, condoned or encouraged political discrimination.

Christy v. Pennsylvania Turnpike Commission, 912 F. Supp. 146, 147 (E.D.Pa. 1996). Thus, the same "evidence" was interpreted differently by the same District Court in two opinions, with diametrically opposite results.

On June 19, 1996 a panel of Third Circuit Court of Appeals granted plaintiff's motion to dismiss the pre-trial appeal of twelve individual defendants from the denial of qualified immunity, in a two-sentence *per curiam* Order without opinion, on the basis that the appeal involved factual issues that precluded interlocutory appeal under *Johnson v. Jones*, 115 S. Ct. 2171 (1995), even though the District Court had not cited *Johnson* and had not identified any factual issues preventing qualified immunity. See 1996 U.S. App. LEXIS 17939 (3d Cir. June 19, 1996), App. 1b.

REASONS TO GRANT A WRIT OF CERTIORARI

A. Summary

As a result of the Third Circuit's refusal to hear the qualified immunity appeal of the 12 individual petitioners (most of whom never knew plaintiff or anything about his political

beliefs), trial is scheduled to start in the Eastern District of Pennsylvania without these individuals having any appellate review of the District Court's denial of qualified immunity. The *Johnson v. Jones* decision upon which the Third Circuit relied was narrowly construed by this Court in *Behrens v. Pelletier*, 116 S.Ct. 834 (1996), so to allow immediate appellate review of qualified immunity unless the only issue is the purely factual question of the sufficiency of the plaintiffs' evidence of a constitutional violation. Other Circuit Courts have also recognized that *Behrens* limited *Johnson* and restored the fuller scope of interlocutory qualified immunity appeals. Despite the fact that all discovery is completed, and that the district court did not cite *Johnson* or cite any factual issues that would preclude a determination of qualified immunity, the Court of Appeals nonetheless dismissed the appeal, claiming lack of appellate jurisdiction under *Johnson*. In a prior appeal, another panel of that court, in this very same case, *accepted* jurisdiction and decided the issue of qualified immunity as to four other individuals who had originally been named as defendants in the case.

The disparate treatment of the various defendants in this case, as well as the Third Circuit's erroneous reading of *Johnson v. Jones* (which has been rejected by other circuits), warrants the granting of certiorari, and reversal of the Third Circuit, with directions to hear the merits of the qualified immunity appeal prior to trial.

B. The Third Circuit's Overly Broad Application of the Narrow *Johnson v. Jones* Exception to Immediate Appellate Review of Denials of Qualified Immunity Is Directly Inconsistent with the Holding and Policy Stated Very Recently In *Behrens v. Pelletier*

In *Behrens v. Pelletier*, 116 S. Ct. 834 (1996), this Court re-affirmed the long-recognized importance of interlocutory appellate review in vindicating qualified immunity. In doing so, the Court narrowly construed *Johnson v. Jones*, 115 S. Ct. 2151 (1995), which held only that the collateral order doctrine did not apply where the claim of qualified immunity was based on an uncertain record as to whether the defendant did or did not do a specific act, and the appeal raised only a factual question of whether the plaintiff had sufficient evidence to create a factual issue of whether the defendants violated the plaintiff's rights.[3] *Id.* at 2159.

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3 To date, the Third Circuit has not issued any published opinion involving *Johnson v. Jones* to deny appellate jurisdiction over a denial of qualified immunity and has not considered *Behrens v. Pelletier*. However, the breadth which the Third Circuit has attached to *Johnson* is clearly demonstrated by comparing the two appeals decided by it in this case. A previous panel of the Court of Appeals in this same case *accepted* appellate jurisdiction before *Johnson* was decided. The Third Circuit, hearing the interlocutory appeal of four other individual defendants in this case, originally dismissed their appeal for lack of jurisdiction, but on rehearing, acknowledged that the appeal fell within the collateral order doctrine. *Christy v. Pennsylvania Turnpike Commission*, 1995 WL 127077 *1 n.4 (3d Cir. 1995), *on rehearing*, 54 F.3d 1140 (3d Cir.), *cert. denied*, 116 S.Ct. 340 (1995). While not all discovery had been completed, the same key evidence

(continued...)

In *Johnson* the factual dispute was very straightforward: whether the defendants were present or participated in an unconstitutional beating of the plaintiff. *Id.* at 2153-54. This Court concluded, for several reasons, that the fact question of whether the defendants participated in the beating suffered by the plaintiff was not truly a question of qualified immunity for which immediate appeal was available.[4] The *Johnson* decision dealt with a very narrow issue, because the only basis the defendants asserted in support of qualified immunity was a factual denial -- that they did not do it and that plaintiff had no evidence that they did do it. *Id.* at 2154. To the extent that Justice Breyer's opinion occasionally suggests that qualified immunity cannot be appealed wherever unresolved issues of fact remain, this Court's subsequent opinion in *Behrens v. Pelletier*, 116 S. Ct. 834 (1996), clarified the matter.

In *Behrens*, the Court emphasized that "*Mitchell* [*v. Forsyth*] clearly establishes that an order rejecting the defense of qualified immunity at *either* the dismissal stage *or* the

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3(...continued)
which was cited in Christy's favor was before the court. The court noted that *Johnson* was pending before this Court, but had not been decided. The fact that a different panel of the same court has denied appellate jurisdiction on the same operative facts after *Johnson* demonstrates that in the Third Circuit *Johnson* has significantly but improperly narrowed the scope of interlocutory appellate review of qualified immunity, and that the Third Circuit has not corrected that scope of appellate review following *Behrens*.

4 The Court concluded that the claim asserted in that case (1) was not similar to the "purely legal" claim of qualified immunity asserted in *Mitchell v. Forsyth*, *Johnson*, 115 S.Ct. 2156, (2) did not satisfy the collateral order requirement that the issue being appealed is separate from the merits of the case, *Id.* at 2157, and (3) was not the sort of claim that was generally appropriate for appellate review, because it was fact-oriented and time consuming for appellate courts, *Id.* at 2158.

summary judgment stage is a 'final judgment' subject to immediate appeal." *Id.* at 839 (emphasis in original). The Court stated three times that denial of a summary judgment motion based on qualified immunity is immediately appealable. *See also Id.* at 840 and n.3. The Court also specifically addressed a *Johnson v. Jones*-type argument and clarified that *Johnson* was a narrow decision that should not be applied overbroadly.[5]

As the *Behrens* Court explained, it is not enough to rely on *Johnson v. Jones*, and show that some material issues of fact exist, in order to defeat qualified immunity.[6] In *Behrens* this Court rejected the overly broad reading of *Johnson* that carried the day in this case in the Court of Appeals:

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5 Justice Breyer, who wrote the opinion in *Johnson*, dissented in *Behrens*. As his dissent in *Behrens* indicates, Justice Breyer would take a generally narrow view of qualified immunity, and a correspondingly broad view of the *Johnson*-type exception. To the extent that these views are expressed in *Johnson v. Jones*, the majority opinion in *Behrens*, authored by Justice Scalia, clearly backs away from that view and reemphasizes the importance of qualified immunity as a policy.

6 Note the distinction in the burden of proof between summary judgment motions asserting qualified immunity from summary judgment motions based on the merits. In the latter case, summary judgment should always be denied where "genuine issues of material fact remain." If qualified immunity could not be granted where genuine issues of material fact remain, then it could *never* be granted prior to discovery when plaintiff has not yet had an opportunity to discover facts in support of his claim. But in fact, qualified immunity is frequently granted prior to discovery as the Court has emphasized it should be, because it is each defendant's belief, viewed objectively, that he was acting in conformance with the law, that entitles him to qualified immunity. *See Anderson v. Creighton*, 483 U.S. 635 (1987). As argued *infra*, the overly broad application of *Johnson v. Jones* will nullify F.R.C.P. 56(e) in summary judgment motions asserting qualified immunity.

> Every denial of summary judgment ultimately rests upon a determination that there are controverted issues of material fact, see F.R.C.P. 56, and *Johnson* surely does not mean every denial of summary judgment is non-appealable. *Johnson* held, simply, that determinations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they happen to arise in a qualified-immunity case.

116 S. Ct. at 842. The Court went on to conclude that a defendant can assert on appeal that his conduct satisfied the "objective legal reasonableness" standard even where the facts most favorable to the plaintiff would establish that the defendant violated clearly established law:

> Here the District Court's denial of petitioner's summary judgment motion necessarily determined that certain conduct attributed to petitioner (which was controverted) constituted a violation of clearly established law. *Johnson* permits petitioner to claim on appeal that all of the conduct which the District Court deems sufficiently supported for purposes of summary judgment met the *Harlow* standard of "objective legal reasonableness."

Id. *Behrens* confirms that defendants should not be deprived of their rights to pre-trial appellate review of qualified immunity merely because the record contains unresolved factual issues.[7]

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7 As argued *infra*, Section D, most circuit courts have concluded that (continued...)

The Court below ruled on the Petitioners' appeal as if Justice Breyer's dissent in *Behrens* had been the majority opinion, broadening *Johnson* and significantly limiting qualified immunity. Unlike *Johnson*, in this case it is not the petitioners' conduct that is in dispute, but rather the reasonableness of the conduct, viewed objectively. The actions of the petitioners, most of whom constitute the Personnel Committee, or served as Commissioners, are well documented and not challenged. Christy does not dispute what each defendant did, but only argues that those actions were taken with discriminatory intent. Whether each defendant acted reasonably, or with discriminatory intent, is different from the "I didn't do it" defense in *Johnson*, and clearly takes the appeal outside the scope of *Johnson*.

When evidence cited by plaintiff (i.e., plaintiff's conversation with Boschi, and Louis Sperduti's post-deposition affidavit) is taken in the light most favorable to plaintiff, there clearly remains an issue of law for the Court to determine: whether, under those facts, the other petitioners could reasonably have believed their conduct comported with *Rutan*. Unlike *Johnson*, where no such legal issue was raised, this case presents the legal question of whether petitioners are still entitled to qualified immunity that falls squarely within the collateral order doctrine.

This Court should grant a Writ of Certiorari to correct the conflict between the Third Circuit's approach to reviewing qualified immunity and the *Behrens* decision.

7(...continued)
Behrens significantly limits *Johnson*.

C. The Third Circuit's Refusal to Accept Jurisdiction of the Qualified Immunity Claims Requires the Defendants to Stand Trial Without Any Resolution of Their Qualified Immunity Claims

Trial is scheduled in this case for January 13, 1997. Petitioners will be forced to stand trial without any appellate review or resolution of their qualified immunity claims unless this Court directs the Third Circuit to accept jurisdiction over the current appeals. Under the Third Circuit's decision in this case, defendants have no pre-trial review of their qualified immunity claims, effectively nullifying the collateral order doctrine. The importance of pre-trial appellate review of a denial of qualified immunity has been stressed by this Court repeatedly, since erroneous denial of qualified immunity that is not addressed until after a trial is effectively lost. *Behrens v. Pelletier*, 116 S. Ct. 834 (1996); *Mitchell v. Forsyth*, 472 U.S. 511, 524-25 (1985) (qualified immunity "is effectively lost if a case is erroneously permitted to go to trial"). As noted below, this is an unfair result because all discovery is completed; there will be no additional facts to create issues relating to qualified immunity. Further, following the procedure in F.R.C.P. 56(e), each defendant put forth unrefuted sworn testimony and declarations denying any discrimination against plaintiff on the two promotions.

In *Behrens*, the Court noted that "if the District Court rules erroneously, the qualified immunity right not to be subjected to pre-trial proceedings will be eliminated, so long as the plaintiff has alleged (with or without evidence to back it

up) violation of "clearly established" right. . . ." -- a result the Court found to be "intolerable."[8] 116 S.Ct. at 842.

If the Third Circuit's broad interpretation of *Johnson* is allowed to stand, then it will improperly deny appellate review -- the only effective remedy -- to appellant-defendants who have a bona fide claim of immunity. *Johnson* only denies appellate review to defendants whose claim of qualified immunity amounts to nothing more than a denial that they "didn't do it." Here, qualified immunity is based on the fact that petitioners reasonably could believe that the actions they took, which are undisputed, were lawful under *Rutan*. If such a claim is not reviewed by an appellate court, then the second half of the qualified immunity standard is meaningless in the Third Circuit.

In dismissing the appeal as to all petitioners, per curiam, the Third Circuit did not state whether the factual record would preclude a reasonable defendant in the position of each appellant from believing he or she was complying with *Rutan*. This omission is unfair because it leaves petitioners (each of whom relied on different facts), in suspense as to why they cannot receive a pretrial appellate ruling on their claim of qualified immunity. The second part of the qualified immunity standard necessarily requires individualized consideration of the circumstances of each individual defendant, since each defendant's conduct must be viewed in light of the information that he or she possessed. *See Anderson*, 483 U.S. at 641.

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8 Under the facts presented in *Behrens*, the defendant had previously appealed a denial of qualified immunity, but the Court of Appeals ruled on the appeal without reaching the issue, so that when the Court of Appeals subsequently dismissed the defendant's second appeal of qualified immunity, the defendant was left without any appellate pre-trial review of his qualified immunity defense. *Id.* at 840.

This Court should grant a Writ of Certiorari to effectuate the important policy requiring pre-trial determination of qualified immunity, which the Third Circuit is not honoring.

D. The Third Circuit's Overly Broad Application of the Narrow *Johnson v. Jones* Exception is Directly Contrary to the Prevailing Law in Other Circuits

In light of *Behrens v. Pelletier*, other Circuit Courts of Appeals disagree with the Third Circuit and hold that *Johnson v. Jones* ought to be read narrowly to deny appellate review of qualified immunity only when the sole issues on appeal are issues of evidentiary sufficiency.

Second Circuit. The Second Circuit has very recently explained that in light of *Behrens*, the *Johnson* decision is not as broad as it first seemed:

> Though it was arguable that *Johnson* intended to preclude an interloctory appeal whenever a district judge denied summary judgment on the ground that a material fact was genuinely in dispute, the Court's subsequent decision in *Behrens* dispelled such a notion. In *Behrens*, the District Court had denied summary judgment precisely on the ground that a disputed issue of fact existed, *id.* at 838, yet an appeal was not precluded, *id.* at 842. Thus, *Behrens* laid to rest any possibility that a district court's mere assertion that disputed factual issues existed was enough to preclude an immediate appeal.

> After *Johnson* and *Behrens*, several types of fact-related rulings remain appealable. The clearest example is where the defendant appeals the denial of an immunity defense on the ground that, on stipulated facts, the defense has established as a matter of law. Similarly, an appeal is available where the defendant accepts, for purposes of the appeal, the facts as alleged by the plaintiff. *See e.g., Jemmott v. Coughlin*, 85 F.3d 61, 66 (2d Cir. 1996). Indeed, *Behrens* goes further and permits an appeal where a defendant contends that the immuity defense is established on those facts, alleged by the plaintiff, that the district court ruled were sufficiently supported to create jury issues. As *Behrens* explained, *Johnson* permits petitioner to claim on appeal that all of the conduct which the District Court deemed sufficiently supported for purposes of summary judgment met the *Harlow* standard of "objective legal reasonableness." *Id.* Even if the district court did not identify the particular charged conduct that it deemed adequately supported, *Johnson* permits an appeal, although it acknowledges that a "court of appeals may have to undertake a cumbersome review of the record to determine what facts the District Court, in the light most favorable to the non-moving party, likely assumed." *Johnson*, 116 S. Ct. at 2159; *Behrens*, 115 S. Ct. at 842.

Salim v. Proulx, 1996 U.S. App. LEXIS 21758, *8 - *10 (2d Cir. August 23, 1996). After a thorough analysis of the two most recent Supreme Court decisions, the Second Circuit

concluded that while the sufficiency of plaintiff's evidence may not be reviewed in a interlocutory appeal,

> An appeal is available, however, to challenge the trial judge's rejection of the immunity defense where the defendant contends that on stipulated facts, or on the facts that the plaintiff alleges are true, or on the facts favorable to the plaintiff that the trial judge concluded the jury might find, the immunity defense is established as a matter of law because those facts show either that he "didn't do it" or that it was objectively reasonable for him to believe that his action did not violate clearly established law.

Id. at *12-*13. Following this analysis, the Second Circuit accepted jurisdiction over the appeal and granted qualified immunity where the defendant asserted that on plaintiff's version of the facts he was entitled to immunity.

In *Jemmott v. Coughlin*, 85 F.3d 61 (2d Cir. 1996), the Court accepted jurisdiction despite the existence of factual disputes regarding the defendants' actions and intent because:

> For the purpose of this appeal . . . the defendants are not contesting the sufficiency of plaintiff's proof, or the district court's ruling that disputed issues of fact require the denial of their summary judgement motion. Instead, they argue that *even if plaintiff's allegations are accepted as true*, no clearly established constitutional right was violated.

Id. at 66 (emphasis added). The court affirmed the district court's denial of summary judgement, holding that "the acts of

each defendant, *if true as alleged*, were sufficiently severe" such that no rational jury could conclude that it was objectively reasonable for the defendants to believe that their behavior did not violate clearly established law. *Id.* (emphasis added). The Second Circuit therefore accepts jurisdiction of qualified immunity appeals despite the presence of material issues of disputed fact, simply viewing such facts in the light most favorable to the plaintiff, so long as the appeal is presented as a "failure to state a claim" question of law. The Second Circuit *denies* appellate jurisdiction only where "the adjudication of the qualified immunity defense *requires* the resolution of genuninely disputed questions of fact." *In re: State Police Litigation*, 88 F.3d 111, 124 (2d Cir. 1996) (emphasis added).

Fifth Circuit. The Fifth Circuit has applied *Johnson* and *Behrens* in a similar manner to the Second Circuit, but focuses on the facts assumed by the district court rather than the facts alleged by the plaintiff. The court has made clear that, under *Behrens* and *Johnson*, disputes of fact do not deprive the court of appellate jurisdiction over qualified immunity appeals unless the appeal seeks a review of "'the evidence sufficiency issue' (i.e. whether the nonmovant presented sufficient summary judgment evidence to create a dispute of fact)." *Nerren v. Livingston Police Dept.*, 86 F.3d 469, 472 (5th Cir. 1996). The court will retain interlocutory jurisdiction and "'take, as given, the facts that the district court assumed when it denied summary judgement' and determine whether these facts state a claim under clearly established law." *Id.* (quoting *Johnson*, 115 S.Ct. at 2159). *See also Cantu v. Rocha*, 77 F.3d 795 (5th Cir. 1996) (accepting appellate jurisdiction and deciding legal claim issue based on alleged facts where moving party did not dispute alleged facts, but only argued that even if facts as alleged were true, plaintiff had failed to state a claim).

Seventh Circuit. The Seventh Circuit considers *Behrens* to be incongruous with rather than supplemental to *Johnson*. In *Clash v. Beatty*, 77 F.2d 1045, 1046 (7th Cir. 1996), the court explained that *Johnson* prohibits appellate jurisdiction over qualified immunity appeals if the district court order denying summary judgement "is based on the existence of genuine issues of fact that require a trial." The court went on to explain that "[c]onversely," *Behrens* and *Mitchell* held that an order denying summary judgement based on qualified immunity is immediately appealable "where the issue [is] whether the facts alleged showed a violation of a 'clearly established' law." *Id.* (citing *Behrens*, 116 S.Ct. 834; *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985)). The task of any court evaluating qualified immunity is then to decide under which of the two frameworks the moving party's qualified immunity defense falls. *Id.* If the district court opinion denying summary judgment was premised on a need for factual development in order to decide the question of qualified immunity, the court lacks appellate jurisdiction under *Johnson*. If the appeal involves only legal issues regarding "the possible application of qualified immunity," the court has jurisdiction under *Behrens* and *Mitchell*. *Id.*

Applying these principles in *Clash*, the court found that key facts relating to the objective reasonableness of the defendant's actions were unknown and disputed. *Clash*, 77 F.3d at 1048. While the physical actions of the defendant were not in dispute, the effects and circumstances surrounding those actions were in dispute. Therefore, the court dismissed the appeal for lack of jurisdiction, finding that the disputed facts must be developed before a definitive ruling on the immunity issue could be made. *Id.*

Eighth Circuit. The Eighth Circuit has summarized its application of *Behrens* and *Johnson* as follows:

> If the issue concerns whether a certain point of law is clearly established, or whether reasonable officials would have known based on the facts available to them that their actions violated the law, the order [denying summary judgement based on qualified immunity] is immediately appealable. . . . If, on the other hand, the issue on appeal is whether the pretrial record creates a genuine issue of material fact as to the occurrence of particular conduct, the order is not immediately appealable.

McGuire v. Schriro, 1996 U.S. App. LEXIS 11546 (8th Cir. May 21, 1996) (citations omitted) (unpublished opinion). In the Eighth Circuit, the existence of factual issues relating to qualified immunity does not preclude interlocutory appeal. Where issues of fact exists, the court simply accepts the facts that the District Court assumed in denying qualified immunity. *Eagle v. Morgan*, 88 F.3d 620, 624 (8th Cir. 1996) ("in resolving this appeal, we will take, as given, the facts that the District Court assumed when it decided summary judgment ...") (quoting *Johnson*, 115 S. Ct. 2159).

In *Heidemann v. Rother*, 84 F.2d 1021, 1027 (8th Cir. 1996), the court accepted appellate jurisdiction over an appeal from a denial of summary judgement based on qualified immunity where the district court had without elaboration rejected qualified immunity because of material issues of fact. The Eighth Circuit was able to address the appeal withou deciding facts by analyzing "(1) what material facts are not genuinely in dispute, viewing the evidence in the light most favorable to plaintiffs, and (2) whether, assuming such facts, defendants infringed a clearly established constitutional or statutory right." *Id.* In conducting this analysis, the court recognized that the mere presence of disputed material facts in

an appeal does not deprive the court of jurisdiction over the entire appeal.

Ninth Circuit. The Ninth Circuit reviewed *Behrens* and *Johnson* together in *Tagupa v. Odo,* 1996 U.S. App. LEXIS 20489 (9th Cir. August 8, 1996) (unpublished opinion), a case in which the controlling law was clearly established and the only qualified immunity issue on appeal was whether defendant's conduct was objectively reasonable in light of the controlling law. In light of *Behrens*, the court accepted jurisdiction and granted qualified immunity because "all of the conduct alleged by *Tagupa* and accepted as true for the purposes of this appeal was objectively reasonable in light of existing law." Id. at *6.[9]

Eleventh Circuit. The Eleventh Circuit takes a slightly different approach, but still recognizes that the existence of disputed facts does not preclude interlocutory review of qualified immunity. In *McMillian v. Johnson*, 88 F.3d 1554, 1563 (11th Cir. 1996), the Court held that "an appellate court may address a district court's resolution of factual issues when the core qualified immunity issue is also raised on appeal from a denial of summary judgement." As long as the sufficiency of the plaintiff's evidence is not the only issue raised on appeal, the court held that it could consider an appeal containing disputed material facts, and in fact could address "challenges to the district court's determination that genuine issues of fact exist as to what conduct the defendant engaged in." *Id.* In

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9 The Ninth Circuit also briefly discussed *Johnson* and *Behrens* in *Osolinski v. Kane*, 1996 U.S. App. LEXIS 20103 (9th Cir. August 12, 1996), and while noting that the Supreme Court in *Behrens* "clarified its holding in *Johnson*", the qualified immunity issue before the court was whether the relevant law was clearly established, an issue that is clearly appealable under either case.

addressing such an appeal, the court may then undertake a review of the facts in the light most favorable to the non-moving party, or may accept the district court's determination of the relevant facts, *id.*, just as indicated in *Behrens*.

The court addressed *Behrens* and *Johnson* even more directly in *Cottrell v. Caldwell*, 85 F.3d 1480 (1996), in which it wrote "as clarified by *Behrens*, *Johnson* does not affect our interlocutory jurisdiction in qualified immunity cases where the denial is based even in part on a disputed issue of law." *Id.* at 1485. The Court also held that appellate jurisdiction exists even where the district court denied qualified immunity with an unadorned statement that '[m]aterial issues of fact remain...'"[10] *Id.* at 1485 (citing *Behrens*, 116 S.Ct. at 838). Appellate jurisdiction exists regardless of the presence or extent of issues of disputed fact, so long as the appeal raises the legal issue of clearly established law or the issue of the objective reasonableness of an actor's behavior in light of the law.

In any of these circuits, the *Johnson* decision would not have prevented the court from hearing Petitioners' qualified immunity clalim. Where circuit courts have denied appellate review following *Behrens*, it has been on a set of facts that fits within the narrow scope of *Johnson*, not simply where the record contains an issue of disputed facts. *See, e.g., McGuire v. Schriro*, 1996 U.S. App. LEXIS 11546, at *3 (8th Cir. May 21, 1996) (denying jurisdiction because issue of fact remained

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10 The *Cottrell* Court actually disapproved two prior decisions that followed *Johnson* but were incompatible with *Behrens*. *Id.* at 1485 (citing with disapproval *Mastroianni v. Bowers*, 74 F.3d 236 (11th Cir. 1996) (holding that under *Johnson* appellate jurisdiction existed only for appeals involving whether the relevant law was clearly established); *Babb v. Lake City Community College*, 66 F.3d 270 (11th Cir. 1996)(same)).

"as to the occurrence of particular conduct"); *Marquez v. Miranda*, 1996 U.S. App. LEXIS 10972, at *5 (9th Cir. April 8, 1996) (unpublished decision) (denying jurisdiction because outcome of appeal depended on factual question whether the defendants actually read the plaintiff's legal mail). Like *Johnson*, in these cases, the appeals depended on questions as to whether the alleged conduct actually occurred or not, not whether the conduct was reasonable under the circumstances. Therefore, the courts properly denied jurisdiction under *Johnson*.

The *Behrens* decision should have made a difference in the way the Third Circuit addressed qualified immunity appeals, as it has in other circuit court decisions issued since *Behrens* was decided. Before *Behrens*, circuit courts following *Johnson* dismissed appeals that raised the second part of the qualified immunity test, whether the defendant's conduct was objectively reasonable under the circumstances. *See, e.g., Myers v. Oklahoma County Board of County Commissioners*, 80 F.3d 421, 424-25 (10th Cir. 1996) (dismissing appeal of qualified immunity based on issue of whether defendant's actions were objectively reasonable); *Mick v. Brewer*, 76 F.3d 1127, 1133 (10th Cir. 1996) (holding that *Johnson* "displaced" Tenth Circuit precedent allowing most qualified immunity appeals and affectively limits the court to review only whether the law was clearly established); *Carter v. Rhode Island*, 68 F.3d 9, 13 (1st Cir. 1995) (emphasizing that *Johnson* changed the court's prior approach on qualified immunity appeals -- "*Johnson* announces a jurisdictional rule -- signaling a new day in the First Circuit" -- and dismissing an appeal that involved whether defendant's actions were objectively reasonable).

Following *Behrens*, circuit courts are now accepting jurisdiction over the question of whether the defendant's actions were objectively reasonable. *See, e.g., Nerren v. Livingston*

Police Department, 86 F.3d at 472 (holding that under *Behrens*, that the defendant can assert an appeal claiming that a reasonable official would have believed his conduct was consistent with clearly established law); *Heidemann v. Rother*, 84 F.3d. at 1027 (finding no impediment to raising question of objective legal reasonableness on appeal).

Rather than recognizing the significance of *Behrens*, the Third Circuit order in this case ignored it and continues to apply the *Johnson* exception broadly. The Petitioners in this case are asserting qualified immunity on the basis that reasonable officials under the circumstances would have believed that their actions were consistent with *Rutan*. This Court should grant the Writ of Certiorari in order to address the direct inconsistency between the Third Circuit's practice under *Johnson* and the practice of other circuits under *Behrens* in considering appeals raising this issue.

E. The Third Circuit's Overly Broad Application of the Narrow *Johnson v. Jones* Exception Threatens to Swallow the Collateral Order Doctrine and F.R.C.P. 56(e) For Summary Judgment Motions Asserting Qualified Immunity

Under the Third Circuit's interpretation of *Johnson* in this case, a summary judgment motion asserting qualified immunity can be defeated whenever summary judgment on the merits would be defeated -- by showing the existence of an issue of fact relating to the defendants' conduct or actions. The result is that qualified immunity will no longer be an immunity from litigation, but merely a defense at trial. *Behrens* recognized that issues of fact need not preclude appellate determination of qualified immunity claims, regardless of

whether the issue is if the law was clearly established or if the defendants' actions satisfied the objective legal reasonableness standard. In *Behrens*, this Court specifically cautioned that *Johnson* should not defeat a defendant's ability to assert either prong of qulaified immunity in an interlocutory appeal, unless the appeal only challenged the sufficiency of plaintiff's evidence. 116 S. Ct. at 842. As set forth *supra*, section D, most circuits have heeded this caution.[11] Unless the Third Cicuit's view of appellate jurisdiction is brought into line with the approach of *Behrens* and most other circuits, government officials in the Third Circuit will not be able to vindicate legitimate claims of "objective legal reasonableness" at the summary judgment stage.

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11 The District of Columbia Circuit has very recently addressed the summary judgment standards that should apply when defendants assert qualified immunity in cases where proof of intent is an essential element of the plaintiff's case. *Crawford-El v. Britton*, 1996 U.S. App. LEXIS 21970 (D.C. Cir. August 27, 1996)(en banc). Recognizing the importance of early resolution of qualified immunity claims, the court "read *Harlow* [*v. Fitzgerald*, 457 U.S. 800 (1982)] as calling for alternative rules to protect officials" who assert qulified immunity under Rule 56. *Id.* at *3. Thus, the Circuit Court held that a defendant is entitled to summary judgment under qualified immunity "unless the plaintiff offers *clear and convincing evidence* on the state-of-mind issue. . ." *Id.* While this Court need not address the District of Columbia Circuit's holding in resolving the issues raised in this Petition, the thoughtful and provocative opinion in *Crawford-El* highlights the problem that *Johnson* can create in trying to vindicate qualified immunity at the summary judgment stage. *See id.* at *35 ("*Johnson* is not remotely so sweeping" as to subordinate the goal of early resolution of qualified immunity to normal summary judgment procedures).

CONCLUSION

For the above reasons, Petitioners respectfully request that the Court grant a Writ of Certiorari in this case.[12]

Respectfully submitted,

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12 In view of the conflict of the decision below with past decisions of this Court, e.g. *Behrens v. Pelletier*, *supra*, and *Mitchell v. Forsyth*, *supra*, the Court may wish to consider summary reversal and remand this matter to the Third Circuit with instructions that it accept jurisdiction and consider Petitioners' qualified immunity appeal on the merits.